

**HIGH COURT OF UTTARANCHAL AT NAINITAL**

(Court’s order whether the case is or not approved for reporting.)

(Chapter VIII, Rule 32 (2)(b)

Description of the case.

A.O. No. 139 of 2005

The New India Assurance Co. Appellant

Versus

Smt. Kala Devi & others Respondents

Approved for reporting.

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Not approved for reporting

Date of decision 31-10-2006

Initial of Judge

**HIGH COURT OF UTTRANCHAL AT NAINITAL**

Appeal from Order No. 139 of 2005

The New India Assurance Co. Ltd. through the Divisional  
Manager, Haldwani (Nainital)

..... Appellant

versus

1. Smt. Kala Devi alias Kalawati Devi w/o Sri Virender Prasad
  2. Smt. Janki Devi w/o late Ghanshyam
  3. Km. Pinki d/o Virendra Prasad aged 13 years
  4. Kailash s/o Virendra Prasad aged about 11 years  
Minors respondents no. 3 and 4 through their mother  
Smt. Kala Devi r/o village Kurad, Pawari Circle  
Pharkhat, Tehsil and District Chamoli
  5. Sri Shashi Bhusan Ghildiyal s/o Sri Virendra Kumar,  
182 Khan Nagar, Jawalapur, Haridwar
  6. Dwaraka Prasad s/o Sri Praja Dutt, Village Kurar,  
Patwari Circle Pherkhet, Tehsil and District Chamoli
- ..... Respondents

Sri T.A. Khan, Advocate for the Appellant  
Sri R.P. Nautiyal, Advocate for respondents no. 1 to 4

Dated: October 31, 2006

**Coram: Hon'ble Rajeev Gupta, C.J.  
Hon'ble Rajesh Tandon, J.**

**Hon. Rajesh Tandon, J.**

- 1) This is insurer's appeal against the Award dated 7.1.2005, passed by the Motor Accident Claims Tribunal, Chamoli.
- 2) The claimants Smt. Kala Devi and others preferred a claim petition under section 166 of the Motor Vehicles Act, for

the grant of compensation on account of the death of Virendra Prasad in a motor vehicle accident. According to the claimants on the fateful day on 27.5.2002, the deceased was going from Kurud to Ghat by Truck No. UP 10-D- 6046. The vehicle was being driven by its driver rashly and negligently, with the result when the vehicle reached near Kumartoli village the driver lost control over the vehicle and it fell down into a ditch. The deceased sustained fatal injuries and he succumbed to his injuries instantaneously.

3) Opposite party respondent no. 5 Sri Shashi Bhushan Ghildiyal filed written statement and admitted the factum of accident but denied that the accident took place due to rash and negligent driving by its driver. He has stated that the driver had valid driving licence. The vehicle was insured with the appellant the New India Assurance Co. and insurance company is liable to pay compensation, if any.

4) The insurance company, appellant has admitted the insurance of the vehicle but it has been denied that the accident had taken place due to negligence of driver of the offending vehicle. The insurance company has alleged that the vehicle was being plied against the terms and conditions of the insurance policy. The driver had no valid driving license and the owner of the vehicle has no valid permit and fitness certificate.

5) In order to prove their case, the claimants have examined Smt. Kala Devi as P.W.1 and Sri Bhawani Dutt as P.W.2. The claimant has also filed copy of post mortem report, copy of F.I.R. and copy of Pariwar Register. The opposite party owner of the vehicle has filed copy of driving licence, driving licence verification report, insurance cover note and fitness certificate.

6) On the basis of the evidence adduced by the claimant, the Claims Tribunal has held that the accident had taken place due to rash and negligent driving of Truck No. UP 10D-6046. The deceased was carrying potato by the truck and he was sitting in the truck as custodian of the goods. The owner of the truck has not charged any fare from the deceased. According to the insurance cover note the insurance company has charged premium for non fare paying no passengers, therefore, the insurance company is liable to pay compensation.

7) So far as the compensation is concerned the Tribunal has recorded the finding that at the time of accident the age of the deceased was 38 years. The Claims Tribunal held that the deceased was doing business but there was no documentary proof regarding his income. Therefore, the claims Tribunal has held the notional income of the deceased as Rs.3,000/- per month of Rs.36,000/- per annum. After deducting 1/3 amount i.e. Rs.12,000/- for his own expenses, the annual dependency of the claimants of the income of the deceased was assessed at Rs.24,000/-. The claims Tribunal selected multiplier of 16 and thus worked out compensation of Rs.3,84,000/-. A sum of Rs.2,000/- for funeral expenses and Rs.5,000/- were paid for loss of consortium. Thus a total compensation of Rs.3,91,000/- was awarded to the claimants.

8) Sri T.A. Khan, counsel for the appellant has submitted that Claims Tribunal has erred in assessing the compensation and the amount of compensation awarded to the claimant is excessive. It is pertinent to mention that permission under section 170 of the M.V. Act, has been refused by the Claims Tribunal.

9) Sri T.A. Khan has further submitted that the driver of the vehicle has no valid driving licence as there is no endorsement in the driving licence regarding authority to drive the vehicle in hill areas. Sri T.A. Khan has referred Rule 193 of the M.V. Rules 1998, which reads as under:

**193. Endorsement of certain licences for hill roads-** *No person shall drive a public service vehicle or a goods vehicle on a hill road unless his license to drive such public service vehicle or goods vehicle has been endorsed by a registering authority with a permission to drive upon hill roads situated within the jurisdiction of such registering authority or in the case of a public service vehicle hired by tourists, by the registering authority of the State with which reciprocal arrangements on the point have been agreed upon.*

10) On the other hand the counsel for the respondent Sri R.P. Nautiyal has submitted that aforesaid endorsement is only applicable for public service vehicles and further their being no such provision under the M.V. Act, therefore, Rule 193 cannot be held to be applicable. Further the Claims Tribunal has recorded the following findings:

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11) We have considered the submissions in the light of the above rules and we find that if there was no endorsement of

authorisation to drive the vehicles in hills, the licence cannot be held invalid. The copy of the licence of the driver shows that it was valid for LMV (T) Light Motor Vehicles (Transport). The definition of Light Motor Vehicle has been given under section 2 (21) of the Motor Vehicle Act, 1988 as under:

(21) *“light motor vehicle’ means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms.*

12) The insurance cover note shows that the vehicle was Truck Tata 407, whose Gross weight was 5300 kg. and as such it was Light Motor Vehicle. Thus we find that the driver of the vehicle had valid driving licence.

11) The Apex Court in the case **United India Insurance Co. Ltd. vs. Lehru and others, 2003 AIR SCW 1695** has held that where the drivers licence found fake, liability of insurance company towards third party does not get avoided. The Apex Court has observed as under:

**“20.** *When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that insurance companies expect owners to make enquiries with RTOs, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that*

*the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The insurance company would not then be absolved of liability. If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia, Sohan Lal Passi and Kamla cases. We are in full agreement with the views expressed therein and see no reason to take a different view.”*

13 In the case **National Insurance Co. Ltd. vs. Swaran Singh, 2004 AIR SCW 663**, the Apex Court has held as under:

*(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use*

*of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.*

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*vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy condition would apply “the rule of main purpose” and the concept of “fundamental breach” to allow defences available to the insurer under Section 149(2) of the Act.*

14) The Apex Court in the case *Lal Chand vs. Oriental Insurance Co. Ltd*; **2006 AIR SCW 4832** after placing reliance upon the case law enumerated in the case *New India Assurance Co. vs. Kamla & others* 2004(4) SCC 342, *United India Insurance Co. Ltd. Vs. Lehru & others*, 2003(3) SCC 338 and *National Insurance Co. Ltd. vs. Swaran Singh & others* reported in 2004 (3) SCC 297 has held as under:

*“In the instant case, the owner has not only seen and examined the driving licence produced by the driver but also took the test of the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. Thus, the owner has satisfied himself that the driver has a licence and is driving competently, there would be no breach of section*

*149(2)(a) (ii) and the Insurance Company would not then be absolved of its liability.”*

15) The owner of the vehicle Sri Dwarika Prasad has mentioned in his written statement that the driver of the vehicle was an expert driver having valid driving licence. He filed the copy of licence along with his written statement.

16) So far as the amount of compensation is concerned, the claimants have mentioned in the claim petition that the deceased was doing business and was earning Rs.5,000/- per month. The claimants have filed Tax receipt of Zila Panchayat, Chamoli which shows that the deceased was doing business at Ghat but there is no documentary proof regarding the income of the deceased and as such the Claims Tribunal has rightly assessed the income of the deceased at Rs.3,000/- per month or Rs.36,000/- per annum. A deduction of 1/3 for the own expenses of the deceased, if he would have been alive, is to be made and thus the annul dependency of the claimant on the income of the deceased comes to Rs.24,000/-. So far as selection of multiplier is concerned the claimants are the wife and children of the deceased. The age of deceased at the time of accident was 38 years and thus the Claims Tribunal awarded compensation of  $\text{Rs.}24000 \times 16 = \text{Rs.}3,84,000/-$ . A further sum of Rs.2000/- was awarded for funeral expenses and Rs.5,000/- for loss of consortium and thus a total sum of Rs.3,91,000/- was awarded as compensation, which appears justified in view of the observations made by the Apex Court, in the case of **T.N. State Transport Corpn. Ltd. vs. S. Rajapriya and others, (2005) 6 Supreme Court Cases 236** as under:

**“8.** *The assessment of damages to compensate the dependants is beset with difficulties because from the nature of things, it has to take into account many imponderables e.g. the life expectancy of the deceased and the dependants, the amount that the deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income together.*

**9.** *The manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his dependants, and to deduct therefrom such part of his income as the deceased was accustomed to spend upon himself, as regards both self-maintenance and pleasure, and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants. Then that should be capitalised by multiplying it by a figure representing the proper number of years' purchase.*

**10.** *Much of the calculation necessarily remains in the realm of hypothesis “and in that region arithmetic is a good servant but a bad master” since there are so often many imponderables. In every case “it is the overall picture that matters”, and the court must try to assess as best as it can the loss suffered.”*

17) The Claims Tribunal has awarded interest @ 5% per annum but since there is no cross appeal by the Claimants, we affirm the compensation and interest awarded by the Tribunal.

18) In view of above, the appeal is devoid of merit and is hereby dismissed. The compensation of Rs.3,91,000/- awarded by the Tribunal is confirmed.

19) No order as to costs.

**(Rajesh Tandon, J.)**

**(Rajeev Gupta, C.J.)**

Dated: October 31, 2006

\*Dhyani